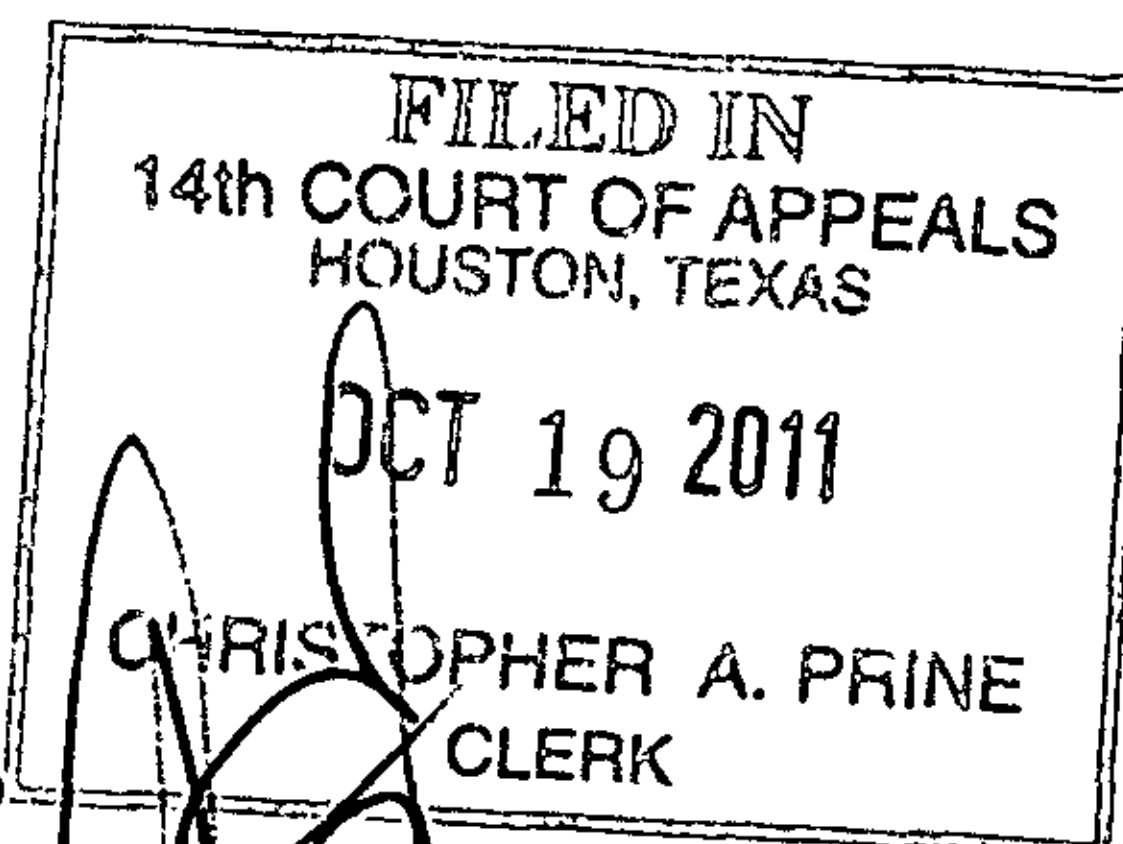


**ORIGINAL**  
No. 14-11915-CR

In the  
Court of Appeals of Texas  
At Houston



—◆—  
**IN RE THE STATE OF TEXAS**  
**EX REL. PATRICIA R. LYKOS**

*Relator*  
V.

**HON. SUSAN BROWN, PRESIDING JUDGE,**  
**185<sup>TH</sup> DISTRICT COURT OF TEXAS**

*Respondent*  
—◆—

MOTION FOR LEAVE TO FILE  
PETITION FOR WRIT OF MANDAMUS  
AND  
REQUEST FOR EMERGENCY STAY OF  
GRAND JURY PROCEEDINGS  
—◆—

**PATRICIA R. LYKOS**  
District Attorney  
Harris County, Texas

**ERIC KUGLER**  
State Bar No: 796910  
Assistant District Attorney  
Harris County, Texas

1201 Franklin, Suite 600  
Houston, Texas 77002  
Tel.: 713-755-5826  
FAX No.: 713-755-5809

*Attorneys for Relator*

## **IDENTIFICATION OF THE PARTIES**

Pursuant to TEX. R. APP. P. 53.2(a) , a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

Relator:

**Patricia R. Lykos** — District Attorney of Harris County, Texas,  
representing The State of Texas

Counsel for the Relator:

**Patricia R. Lykos** — District Attorney of Harris County  
1201 Franklin, Suite 600, Houston, Texas 77002

**John Barnhill; Carl Hobbs** — Assistant District Attorneys in grand jury  
1201 Franklin, Suite 600, Houston, Texas 77002

**Alan Curry; Eric Kugler** — Assistant District Attorneys on appeal  
1201 Franklin, Suite 600, Houston, Texas 77002

Respondent:

**Hon. Susan Brown, Presiding judge, 185<sup>th</sup> District Court of Texas**  
1201 Franklin, Suite 1900, Houston, Texas 77002

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
IDENTIFICATION OF THE PARTIES .....	i
INDEX OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
STATEMENT OF JURISDICTION.....	1
ISSUE PRESENTED.....	1
STATEMENT OF FACTS .....	2
WRIT OF MANDAMUS .....	4
EMERGENCY STAY.....	6
ARGUMENT.....	7
No Adequate Remedy at Law .....	7
Clear Entitlement to Relief .....	7
PRAYER FOR RELIEF .....	13
CERTIFICATE OF SERVICE .....	15

## INDEX OF AUTHORITIES

### CASES

<b>Bourque v. State,</b> 156 S.W.3d 675 (Tex. App.— Dallas 2005, pet. ref'd) .....	8
<b>Federal Deposit Insurance Corporation v. Nueces County,</b> 886 S.W.2d 766 (Tex. 1994).....	5
<b>General Land Office of State of Tex. v. OXY U.S.A.,</b> 789 S.W.2d 569 (Tex. 1990).....	5
<b>In re Reed,</b> 901 S.W.2d 604 (Tex. App.— San Antonio 1995, no pet.) .....	6
<b>Neveu v. Culver,</b> 105 S.W.3d 641 (Tex. Crim. App. 2003).....	4, 5
<b>Olson v. Comm'n for Lawyer Discipline,</b> 901 S.W.2d 520 (Tex. App.— El Paso 1995, no writ).....	5
<b>State ex rel. Hill v. Fifth Court of Appeals,</b> 34 S.W.3d 924 (Tex. Crim. App. 2001).....	4, 5
<b>State ex rel. Holmes v. Salinas,</b> 784 S.W.2d 421 (Tex. Crim. App. 1990).....	10
<b>State ex rel. Rosenthal v. Poe,</b> 98 S.W.3d 194 (Tex. Crim. App. 2003).....	4, 5
<b>State v. Patrick,</b> 86 S.W.3d 592 (Tex. Crim. App. 2002).....	4
<b>Weinstein v. Bradford,</b> 423 U.S. 147 (1975).....	5

## **STATUTES**

TEX. CODE CRIM. PROC. art. 19.26-19.34 (West 2010).....	8
TEX. CODE CRIM. PROC. art. 2.01 (West 2010) .....	8
TEX. CODE CRIM. PROC. art. 20.011(a) (West 2010).....	9
TEX. CODE CRIM. PROC. art. 20.011(b) (West 2010) .....	9
TEX. CODE CRIM. PROC. art. 20.04 (West 2010) .....	9, 10
TEX. CODE CRIM. PROC. art. 20.15 (West 2010) .....	8
TEX. CRIM. PROC. CODE ANN. art. 4.03 (West 2011).....	1
TEX. CRIM. PROC. CODE art. 44.01 (West 2011) .....	7
TEX. GOV'T CODE § 22.221 (West 2011) .....	1
TEX. GOV'T CODE § 311.016 (West 2010).....	9
TEX. GOV'T CODE. § 22.103 (West 2011) .....	1

## **RULES**

TEX. R. APP. P. 52 .....	1
TEX. R. APP. P. 52.10(a) .....	6
TEX. R. APP. P. 52.10(b) .....	6, 7
TEX. R. APP. P. 53.2(a).....	i

## **CONSTITUTIONAL PROVISIONS**

TEX. CONST. art. V, § 5(c) .....	1
----------------------------------	---

**TO THE HONORABLE COURT OF APPEALS OF TEXAS:**

**STATEMENT OF THE CASE**

This is a petition for writ of mandamus against Susan Brown, Presiding Judge of the 185th District Court of Harris County, Texas. This petition seeks to order the Respondent to reverse her ruling, which denied the Relator's Motion For Access To The Grand Jury Room While Grand Jurors Are Not Deliberating. (Appendix A, B, C).<sup>1</sup> This is also a request for an emergency stay of the grand jury proceedings for the Grand Jury of the 185th District Court of Harris County, August 2011 Term, until such time as this Court can determine the merit of the petition for writ of mandamus.

**STATEMENT OF JURISDICTION**

Jurisdiction of this Honorable Court is invoked pursuant to TEX. CONST. art. V, § 5(c); TEX. CRIM. PROC. CODE ANN. art. 4.03 (West 2011); TEX. GOV'T CODE § 22.221 (West 2011); and TEX. R. APP. P. 52.

**ISSUE PRESENTED**

The Respondent erred in denying the Relator and her assistant district attorneys the power to go before the grand jury, to inform them of offenses liable to indictment, to examine the witnesses before the grand jury, and to advise the grand jury as to the proper mode of interrogation as guaranteed by Articles 20.02 and 20.03 of the Code of Criminal Procedure.



## **STATEMENT OF FACTS**

The Respondent, Susan Brown, is the Presiding Judge of the 185th District Court of Harris County, Texas, and her Grand Jury for the August 2011 Term is currently in session. (Appendix B, C). On October 18, 2011, Carl Hobbs, Steve Morris, and John Barnhill, assistant district attorneys with the Harris County District Attorney's Office, were present in the grand jury room after the grand jurors had finished their normal business for the day. (Appendix B, C). Despite the fact that their work was complete, they appeared to be preparing to question an additional witness. (Appendix B, C).

The bailiff of the Grand Jury told the assistant district attorneys that they had to leave the grand jury room while the witness was being questioned. (Appendix B, C). The foreperson of the Grand Jury did not state that the Harris County District Attorney's Office was disqualified from the investigation or that the Grand Jury was investigating anyone from the Harris County District Attorney's Office. (Appendix C). Rather, the foreperson stated that the Grand Jury was conducting an independent investigation, that they had been advised that they could conduct the investigation without the presence of an assistant district attorney, and that they had been told that they could question witnesses outside the presence of a prosecutor. (Appendix C). During the confrontation, the foreperson of the Grand Jury excused herself to make a private phone call, stating that she would call the judge. (Appendix B). The foreperson then returned to confirm that

---

<sup>1</sup> This Court can ascertain, on affidavit or otherwise, the matters of fact that are necessary to the exercise of its jurisdiction. *See* TEX. GOV'T CODE. § 22.103 (West 2011).

she had been told that she did not have to permit an attorney representing the State to be present when they were conducting their investigation. (Appendix B, C).

Mr. Hobbs requested that the Grand Jury recess to allow the Harris County District Attorney's Office to brief the matter and present it to Judge Brown for her ruling the following day. (Appendix C). The foreman responded by telling Mr. Barnhill and Mr. Hobbs to leave the room. (Appendix C). Meanwhile, the bailiff for the Grand Jury was talking on the telephone and stating that she was ordered to arrest the prosecutors if they entered the grand jury room. (Appendix B). The Grand Jury bailiff then ordered Mr. Barnhill and Mr. Hobbs to accompany her out of the room; the door was closed on the grand jury room with the witness and court reporter inside, but with no attorney representing the Harris County District Attorney's Office, no attorney pro tem, and no special prosecutor present to advise the Grand Jury. (Appendix C). The witness, a court reporter,<sup>2</sup> and members of the Grand Jury left the room more than an hour later. (Appendix C).

Meanwhile, Mr. Barnhill sought an emergency appearance before Judge Brown. (Appendix B, C). He and other assistant district attorneys urged Judge Brown to grant the State's motion for an assistant district attorney to be present during the questioning of witnesses by her Grand Jury. (Appendix A, B, C). She denied that motion the same day. (Appendix A-C).

---

<sup>2</sup> A record was apparently made of this meeting; however, the Harris County District Attorney's Office has not been provided with that record.



Her rationale for the ruling was not clear. (Appendix B). She repeatedly asked the prosecutors why they wanted to be present for the questioning and asked if there were any cases on point. She discounted the language of *State ex rel. Holmes v. Salinas*, 784 S.W.2d 421, 426 (Tex. Crim. App. 1990), and stated that this was the grand jury's investigation, not the district attorney's investigation. (Appendix B). She also repeatedly cited *In re Guerra*, 235 S.W.3d 392 (Tex. App.—Corpus Christi 2007, no pet.), and asked the prosecutors if they had read that case. (Appendix B). She stated that the law was unsettled and that there were no cases on point. (Appendix B).

### **WRIT OF MANDAMUS**

Mandamus relief may be granted if the relator can demonstrate that: (1) the act sought to be compelled is purely ministerial, and (2) that relator has no other adequate legal remedy. *Neveu v. Culver*, 105 S.W.3d 641, 642 (Tex. Crim. App. 2003) (citing *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 198 (Tex. Crim. App. 2003)). The Court of Criminal Appeals has alternatively stated that, in order to be entitled to a writ of mandamus, the relator must demonstrate that: (1) there is no other adequate legal remedy, and (2) there is a clear and indisputable right to the relief sought. *State v. Patrick*, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002) (citing *State ex rel. Hill v. Fifth Court of Appeals*, 34 S.W.3d 924, 927 (Tex. Crim. App. 2001)). The ministerial act requirement has been described as a requirement that the relator have “a clear right to the relief sought” meaning that the relief sought must be “clear and indisputable” such that its

merits are “beyond dispute” with “nothing left to the exercise of discretion or judgment.” *Neveu*, 105 S.W.3d at 642 (citing *Poe*, 98 S.W.3d at 198; *Hill*, 34 S.W.3d at 927-28).

The mootness doctrine limits courts to deciding cases in which an actual controversy exists. *Federal Deposit Insurance Corporation v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994); *Olson v. Comm’n for Lawyer Discipline*, 901 S.W.2d 520, 522 (Tex. App.—El Paso 1995, no writ). If a judgment cannot have a practical effect on an existing controversy, the case is moot. *Olson*, 901 S.W.2d at 522. The present case is not moot because the Grand Jury has subpoenaed another witness and has demonstrated an intent to exclude the district attorney’s office from the interview of that witness while the supervising judge has shown that she will not enforce the Code of Criminal Procedure regarding such interviews. (Appendix B). The actual controversy is with the Respondent allowing the Grand Jury to exclude the Relator from the grand jury room, which is a continuing controversy so long as the Grand Jury is in session.

Even if this Court believes that the issue is moot because the first witness has now left the grand jury room, this issue fits within an exception to the mootness doctrine because it is “capable of repetition yet evading review.” *General Land Office of State of Tex. v. OXY U.S.A.*, 789 S.W.2d 569 (Tex. 1990). The doctrine is applicable where two elements combine: 1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and 2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 148-149 (1975). In this case, the witness had left the grand jury

room by the time the Relator was able to draft a motion, present it to the Respondent, and secure a ruling by the Respondent. (Appendix B). Thus, the challenged action was too short in duration to be fully litigated. Furthermore, the Grand Jury remains in session and has subpoenaed another witness who is intimately connected with the first witness concerning the Houston Police Department's use of Intoxilyzer machines in their mobile Blood Alcohol Testing vans. (Appendix B). Therefore, not only is there a reasonable expectation that the Relator will be subjected to the same action again, that subjugation is imminent.

### **EMERGENCY STAY**

This Court may grant, without notice, any just relief pending this Court's action on the mandamus petition, whether on a motion of any party or on its own initiative. TEX. R. APP. P. 52.10(b); *In re Reed*, 901 S.W.2d 604 (Tex. App.—San Antonio 1995, no pet.) (holding that court of appeals had authority to issue order directing judge of county court at law to cease and desist from engaging in any further proceedings in connection with criminal case to maintain status quo and preserve its jurisdiction to consider merits of petition for writ of mandamus). The Relator must notify or make a diligent effort to notify all parties by expedited means that a motion for temporary relief has been or will be filed and must certify to the Court that the Relator has complied with this requirement before temporary relief will be granted. TEX. R. APP. P. 52.10(a). Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided. TEX. R. APP. P. 52.10(b).

## **ARGUMENT**

### **No Adequate Remedy at Law**

The Relator, the State of Texas, has no right to appeal the intended action of the Respondent in this case. *See* TEX. CRIM. PROC. CODE art. 44.01 (West 2011). Article 44.01 allows the State to appeal an order of a court in a criminal case if the order dismisses an indictment or any portion of an indictment, arrests or modifies a judgment, grants a new trial, sustains a claim of former jeopardy, grants a motion to suppress evidence in certain cases, is issued for forensic DNA testing, or pronounces an illegal sentence. TEX. CRIM. PROC. CODE art. 44.01 (West 2011). In the present case, the Respondent's denial of the Relator's motion did none of those things.

The State cannot challenge the Respondent's action by way of an application for a writ of habeas corpus, and the Texas Legislature has set up no administrative remedy whereby the State can challenge the Respondent's action. The State can only pursue relief by way of an extraordinary writ before this Court.

### **Clear Entitlement to Relief**

There is no authority that would allow a grand jury to exclude the district attorney from the grand jury room at this point for any purpose other than to allow the grand jurors to deliberate or to vote on the indictments, but no witness may be present for such deliberations or such a vote. The relevant statutes repeatedly grant the attorney representing the State the power to question witnesses and the duty to assist in such questioning.



The district attorney has the duty to represent the State in grand jury proceedings. Article 2.01 of the Code of Criminal Procedure is entitled, “Duties of District Attorneys,” and requires that each “district attorney shall represent the State in all criminal cases in the district courts of his district...” TEX. CODE CRIM. PROC. art. 2.01 (West 2010). The grand jury is empanelled and sworn by the district court. TEX. CODE CRIM. PROC. art. 19.26-19.34 (West 2010). It must also rely on the district court to enforce its investigations. TEX. CODE CRIM. PROC. art. 20.15 (West 2010). Therefore, the grand jury is “often characterized as an arm of the court by which it is appointed rather than an autonomous entity.” *Bourque v. State*, 156 S.W.3d 675, 678 (Tex. App.–Dallas 2005, pet. ref’d). It follows that the district attorney and her assistants are required to represent the State in grand jury proceedings, which would be impossible to do if a district attorney could be excluded from grand jury investigations.

The district attorney may only be excluded from the grand jury room during deliberations and voting. Article 20.011 of the Code of Criminal Procedure is entitled “Who may be present in grand jury room,” and provides that only three types of people may be present in the grand jury room without qualification: the grand jurors, the bailiffs, and the attorney representing the State. TEX. CODE CRIM. PROC. art. 20.011(a) (West 2010). There is only one provision in the entire Code of Criminal Procedure that prohibits the attorney representing the State from being in the grand jury room, and that is the second part of Article 20.011, which provides that only a grand juror may be in a grand jury room while the grand jury is deliberating. TEX. CODE CRIM. PROC. art.

20.011(b) (West 2010). It follows that the district attorney has the right to be present for the questioning of witnesses because the grand jury cannot deliberate while a witness is present.

The district attorney has a duty to advise the jury on the proper questioning of witnesses, which would be frustrated if a district attorney could be excluded from the grand jury room during the questioning of such witnesses. Article 20.04 of the Code of Criminal Procedure is entitled “Attorney may examine witnesses,” and provides that the “attorney representing the State *may* examine the witnesses before the grand jury and *shall* advise as to the proper mode of interrogating them.” TEX. CODE CRIM. PROC. art. 20.04 (West 2010) (emphasis added). Under the Code Construction Act, the term “may” creates discretionary authority or grants permission or a power while the term “shall” imposes a duty. TEX. GOV’T CODE § 311.016 (West 2010). Thus, the district attorney has the discretionary authority or power to examine the witnesses before the grand jury and the duty to advise the grand jury on the proper mode of questioning. These powers and duties require the presence of the district attorney in the grand jury room during the questioning of witnesses.

The district attorney always has the right to enter the grand jury room and advise the grand jury on possible offenses so long as the jury is not deliberating. The attorney representing the State has both the right and the responsibility to go before the grand jury at any time to discuss potential offenses. *State ex rel. Holmes v. Salinas*, 784 S.W.2d 421, 426 (Tex. Crim. App. 1990). Article 20.03 of the Code of Criminal Procedure is entitled



“Attorney representing State entitled to appear,” and provides that the “attorney representing the State, is entitled to go before the grand jury and inform them of offenses liable to indictment *at any time* except when they are discussing the propriety of finding an indictment or voting upon the same.” TEX. CODE CRIM. PROC. art. 20.04 (West 2010) (emphasis added). “At any time” would necessarily include the times when the grand jury is questioning a witness.

In *Salinas*, the Court of Criminal Appeals addressed the extent of the interaction between grand juries and district attorneys. The court stated that “the Code clearly envisions that both entities will work together to resolve the particular matters at issue, either in instances where some member of the panel may have knowledge of an offense liable for indictment, or ‘of which they shall be informed by the attorney representing the State....’” *Salinas*, 784 S.W.2d at 426. Thus, whether the grand jury is conducting an investigation on its own initiative or working at the behest of the district attorney, the district attorney has the right to participate in the process. The *Salinas* court continued to emphasize the prosecution’s *right* and *entitlement* to be in the grand jury room during investigations as follows:

...it is apparent that a district attorney has not only been given the authority but also assigned the responsibility by the Legislature to bring matters “liable to indictment” to the attention of the grand jury. This responsibility does not begin after an examining trial; the district attorney is charged with informing the grand jury of alleged offenses “*at any time*” other than the time the panel is engaged in discussion or deliberation. Moreover, the statute speaks in terms of the district attorney’s *right* to seek an indictment at any such time: “The attorney representing the State, is *entitled* to go before the grand jury and inform them of offenses liable to

indictment at any time except when they are discussing the propriety of finding an indictment or voting upon the same.”

*Salinas*, 784 S.W.2d at 426-427 (emphasis in original) (footnote omitted). Thus, the Relator has a clear entitlement to the relief sought, namely, the right to be present in the grand jury room during the examination of witnesses, the right to inform them of offenses liable to indictment, the right to examine the witnesses before the grand jury, and the right to advise the grand jury as to the proper mode of interrogation.

The Respondent cited *In re Guerra*, 235 S.W.3d 392 (Tex. App.—Corpus Christi 2007, no pet.), in support of her ruling, but that opinion is distinguishable from the present situation on numerous counts. In *Guerra*, the 197<sup>th</sup> Judicial District Grand Jury of Willacy County asked to meet with the respondent, Judge Migdalia Lopez of the 197<sup>th</sup> District Court. *Id.*, 235 S.W.3d at 399. The grand jury expressed concerns that the district attorney of Willacy County had “abused his office in several respects.”<sup>3</sup> *Id.* The grand jury further requested that an attorney pro tem be appointed to assist in the grand jury’s investigation of those concerns. *Id.* Judge Lopez appointed Gustavo Garza as attorney pro tem, who eventually drafted an arrest warrant for the district attorney based on two counts of theft by public servant and one count of attempted theft by public servant. *Id.*, 235 S.W.3d at 399-401. The district attorney filed a petition for writ of mandamus with

---

<sup>3</sup> Among the allegations were that the district attorney had: requested that the grand jury investigate and indict several Willacy County elected officials; requested that the grand jury subpoena the district judge; requested indictments without presenting any evidence; ordered the grand jury to create a five-member committee to investigate and indict the district clerk, county clerk, county sheriff and bail bond board members for neglect of office based on a civil matter; demanded \$10,000 from a bail bond company worker who was indicted for a sex offense in retaliation for nonpayment of the money; “true bill” a case that the Grand Jury was in favor of a “no bill” by stating that the suspect was going to be arrested anyway; used the grand jury process to intimidate individuals or get even; and committed voter fraud during the election of March 2004. *Guerra*, 235 S.W.3d at 399-400.

the Corpus Christi Court of Appeals, requesting that Judge Lopez's order appointing Garza as attorney pro tem be rescinded. *Id.*, 235 S.W.3d at 401.

The Corpus Christi Court of appeals noted that requiring a grand jury to seek the advice and assistance of a district attorney who is the subject of the jury's investigation is "a recipe for disaster," because the rules place the district attorney "in the best position for obstructing the investigation." *Id.*, 235 S.W.3d at 407. The court recognized that the district attorney and grand jury must work together to resolve particular matters at issue and stated that the appointment of an attorney pro tem was the only means of safeguarding that teamwork where the district attorney was the subject of the jury's investigation. *Id.* The court held that Judge Lopez was authorized to appoint a competent person to act in the district attorney's place based on Article 2.07 of the Code of Criminal Procedure<sup>4</sup> because it was "confronted with a case in which there undoubtedly exist special reasons why relator [the district attorney] should not act and why he is disqualified to act." *Id.*, 235 S.W.3d at 414. Nevertheless, the court ultimately ruled that Judge Lopez had abused her discretion in appointing Garza to that post based on Garza's conflicting interests and status as a prospective witness in the case. *Id.*, 235 S.W.3d at 428-433.

In the present situation, there has been no appointment of an attorney pro tem, and there have been no allegations by the grand jury and or by the Respondent that the Relator

---

<sup>4</sup> Article 2.07 provides in part that "[w]henver an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of his office, or in any instance where there is no attorney for the state, the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state." TEX. CODE CRIM. PROC. art. 2.07(a) (West 2011).



has abused her office in such a manner so as to justify the appointment of an attorney pro tem. (Appendix B, C). Furthermore, unlike in *Guerra*, there was no attorney representing the State present with the grand jury while they were questioning a witness. (Appendix B). There was no attorney representing the State present with the Grand Jury to inform them of offenses liable to indictment, to examine the witnesses before the Grand Jury, or to advise the Grand Jury as to the proper mode of interrogation. Thus, the Respondent cannot rely on *Guerra* to justify her actions in this case. The Relator has shown a clear entitlement to the relief as required by Articles 20.03 and 20.04 of the Code of Criminal Procedure, and this Court should grant relief.

### **PRAYER FOR RELIEF**

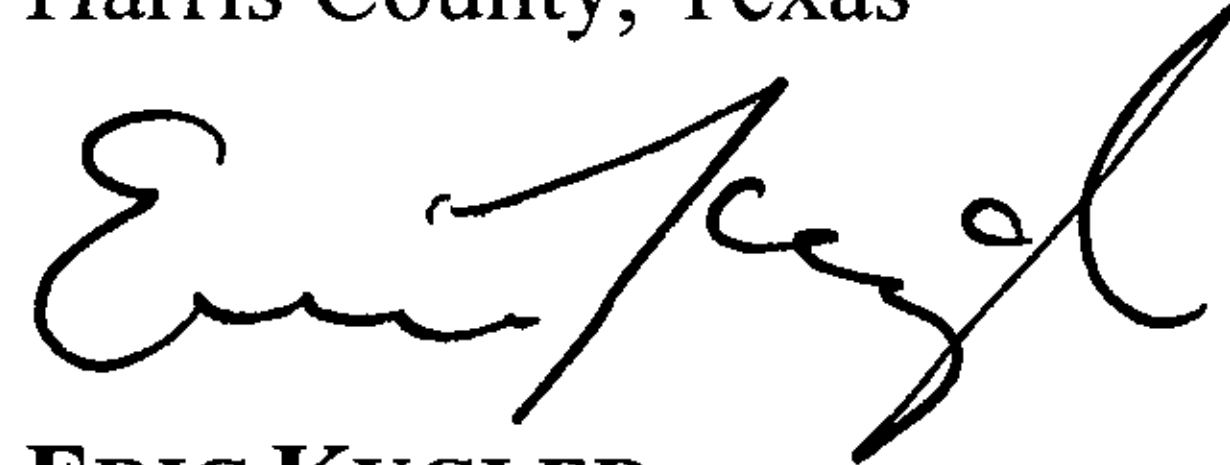
The Relator respectfully requests that this Honorable Court:

- Issue an emergency stay of the grand jury proceedings for the Grand Jury of the 185th District Court of Harris County, August 2011 Term, until such time as this Court can determine the merits of the petition for writ of mandamus; and,
- Issue a writ of mandamus directing the Respondent to reverse her ruling, which denied the Relator's Motion For Access To The Grand Jury Room While Grand Jurors Are Not Deliberating, and to thereby grant the Relator the right to inform the Grand Jury of offenses liable to indictment, the right to examine the witnesses before the Grand Jury, and the right to advise the Grand Jury as to the proper mode of interrogation at all times with the exception of during their deliberations and their voting. Such relief would also prevent the Respondent from allowing her Grand Jury to order their bailiff to exclude the

Relator and her assistant district attorneys from the grand jury room while the grand jurors are questioning a witness.

Respectfully submitted,

**PATRICIA R. LYKOS**  
District Attorney  
Harris County, Texas

A handwritten signature in black ink, appearing to read "Eric Kugler", written in a cursive style.

**ERIC KUGLER**  
Assistant District Attorney  
Harris County, Texas  
1201 Franklin, Suite 600  
Houston, Texas 77002  
(713) 755-5826  
TBC No. 796910

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing instrument has been hand-delivered to the following addresses on October 19, 2011:

Hon. Susan Brown  
Presiding judge, 185th District Court  
1201 Franklin, Suite 1700  
Houston, Texas 77002

Furthermore, this serves as notification to the Respondent and certification to this Court that a motion for temporary relief has been filed under TEX. R. APP. P. 52.10(a).



**ERIC KUGLER**  
Assistant District Attorney  
Harris County, Texas  
1201 Franklin, Suite 600  
Houston, Texas 77002  
(713) 755-5826  
TBC No. 796910

Date: October 19, 2011



*Appendix A*

*State's Motion For Access To The Grand Jury Room  
While Grand Jurors Are Not Deliberating*

*and*

*Order on State's Motion For Access To The Grand Jury Room  
While Grand Jurors Are Not Deliberating*

THE STATE OF TEXAS  
  
COUNTY OF HARRIS

§ IN THE MATTER OF  
§ THE GRAND JURY FOR  
§ THE 185<sup>TH</sup> DISTRICT COURT  
§ AUGUST TERM, 2011

**STATE'S MOTION FOR ACCESS TO THE GRAND JURY ROOM**  
**WHILE GRAND JURORS ARE NOT DELIBERATING**

TO THE HONORABLE JUDGE OF THE COURT:

THE STATE OF TEXAS, by and through the undersigned Assistant District Attorney respectfully requests that this Honorable Court order the Grand Jury for 185<sup>th</sup> District Court, August 2011 term, to allow the district attorney access to the grand jury room while the grand jury is not deliberating. Specifically, this Court should order the grand jury to allow the district attorney and her assistant district attorneys to go before the grand jury, to inform them of offenses liable to indictment, to examine the witnesses before the grand jury, and to advise the grand jury as to the proper mode of interrogation, and would show this Court as follows:

The bailiff for the Grand Jury for 185<sup>th</sup> District Court, August 2011 term has ordered the district attorney and her assistant district attorneys out of the grand jury room while the grand jury is questioning a witness, Brent Mayr.

There is no authority that would allow a grand jury to exclude the district attorney from the grand jury room at this point for any purpose other than to allow the grand jurors to deliberate or to vote on the indictments, but no witness may be present for such deliberations or such a vote. The relevant statutes repeatedly grant the attorney representing the State the power to question witnesses and the duty to assist in such questioning.

The district attorney has the duty to represent the State in grand jury proceedings. Article 2.01 of the Code of Criminal Procedure is entitled, “Duties of District Attorneys,” and requires that each “district attorney shall represent the State in all criminal cases in the district courts of his district...” TEX. CODE CRIM. PROC. art. 2.01 (West 2010). The grand jury is empanelled and sworn by the district court. TEX. CODE CRIM. PROC. art. 19.26-19.34(West 2010). It must also rely on the district court to enforce its investigations. TEX. CODE CRIM. PROC. art. 20.15 (West 2010). Therefore, the grand jury is “often characterized as an arm of the court by which it is appointed rather than an autonomous entity.” *Bourque v. State*, 156 S.W.3d 675, 678 (Tex. App.–Dallas 2005, pet. ref’d). It follows that the district attorney and her assistants are required to represent the State in grand jury

proceedings, which would be impossible to do if a district attorney could be excluded from grand jury investigations.

The district attorney may only be excluded from the grand jury room during deliberations and voting. Article 20.011 of the Code of Criminal Procedure is entitled “Who may be present in grand jury room,” and provides that only three types of people may be present in the grand jury room without qualification: the grand jurors, the bailiffs, and the attorney representing the State. TEX. CODE CRIM. PROC. art. 20.011(a) (West 2010). There is only one provision in the entire Code of Criminal Procedure that prohibits the attorney representing the State from being in the grand jury room, and that is the second part of Article 20.011, which provides that only a grand juror may be in a grand jury room while the grand jury is deliberating. TEX. CODE CRIM. PROC. art. 20.011(b) (West 2010). It follows that the district attorney has the right to be present for the questioning of witnesses because the grand jury cannot deliberate while a witness is present.

The district attorney has a duty to advise the jury on the proper questioning of witnesses, which would be frustrated if a district attorney could be excluded from the grand jury room during the questioning of such

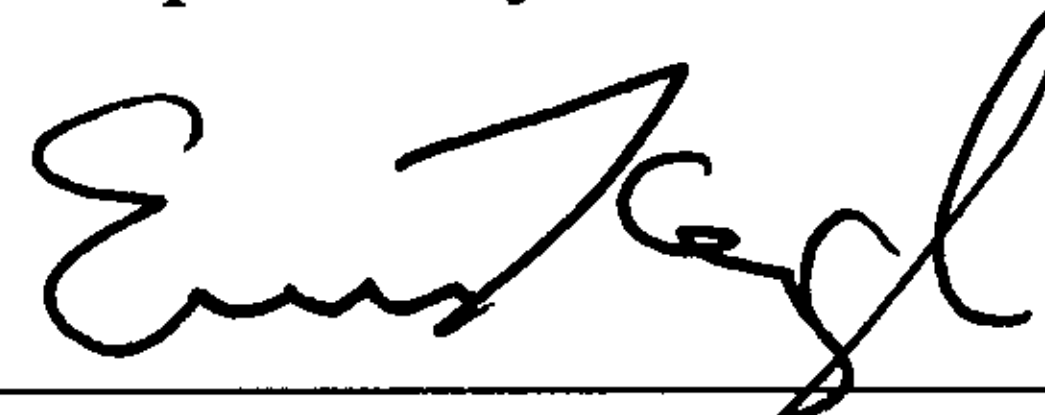
witnesses. Article 20.04 of the Code of Criminal Procedure is entitled “Attorney may examine witnesses,” and provides that the “attorney representing the State *may* examine the witnesses before the grand jury and *shall* advise as to the proper mode of interrogating them.” TEX. CODE CRIM. PROC. art. 20.04 (West 2010) (emphasis added). Under the Code Construction Act, the term “may” creates discretionary authority or grants permission or a power while the term “shall” imposes a duty. TEX. GOV’T CODE § 311.016 (West 2010). Thus, the district attorney has the discretionary authority or power to examine the witnesses before the grand jury and the duty to advise the grand jury on the proper mode of questioning. These powers and duties require the presence of the district attorney in the grand jury room during the questioning of witnesses.

The district attorney always has the right to enter the grand jury room and advise the grand jury on possible offenses so long as the jury is not deliberating. the attorney representing the State has both the right and the responsibility to go before the grand jury at any time to inform the jury of offenses liable to indictment. *State ex rel. Holmes v. Salinas*, 784 S.W.2d 421, 426 (Tex. Crim. App. 1990). Article 20.03 of the Code of Criminal Procedure is entitled “Attorney representing State entitled to appear,” and

provides that the “attorney representing the State, is entitled to go before the grand jury and inform them of offenses liable to indictment *at any time* except when they are discussing the propriety of finding an indictment or voting upon the same.” TEX. CODE CRIM. PROC. art. 20.04 (West 2010) (emphasis added). “At any time” would necessarily include the times when the grand jury is questioning a witness.

The State requests that this Honorable Court inform the Grand Jury for 185<sup>th</sup> District Court, August 2011 term, that the grand jurors may not exclude the district attorney or her assistant district attorneys from the grand jury room for any purpose other than to allow the grand jurors to deliberate or to vote on the indictments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ernest K. [unclear]", written over a horizontal line.

Assistant District Attorney  
Harris County, Texas



THE STATE OF TEXAS

COUNTY OF HARRIS

§  
§  
§  
§

IN THE MATTER OF  
THE GRAND JURY FOR  
THE 185<sup>TH</sup> DISTRICT COURT  
AUGUST TERM, 2011

**ORDER ON**  
**STATE'S MOTION FOR ACCESS TO THE GRAND JURY ROOM**  
**WHILE GRAND JURORS ARE NOT DELIBERATING**

After having considered the State's Motion For Access To The Grand Jury  
Room While Grand Jurors Are Not Deliberating, the Court hereby

GRANTS \_\_\_\_\_

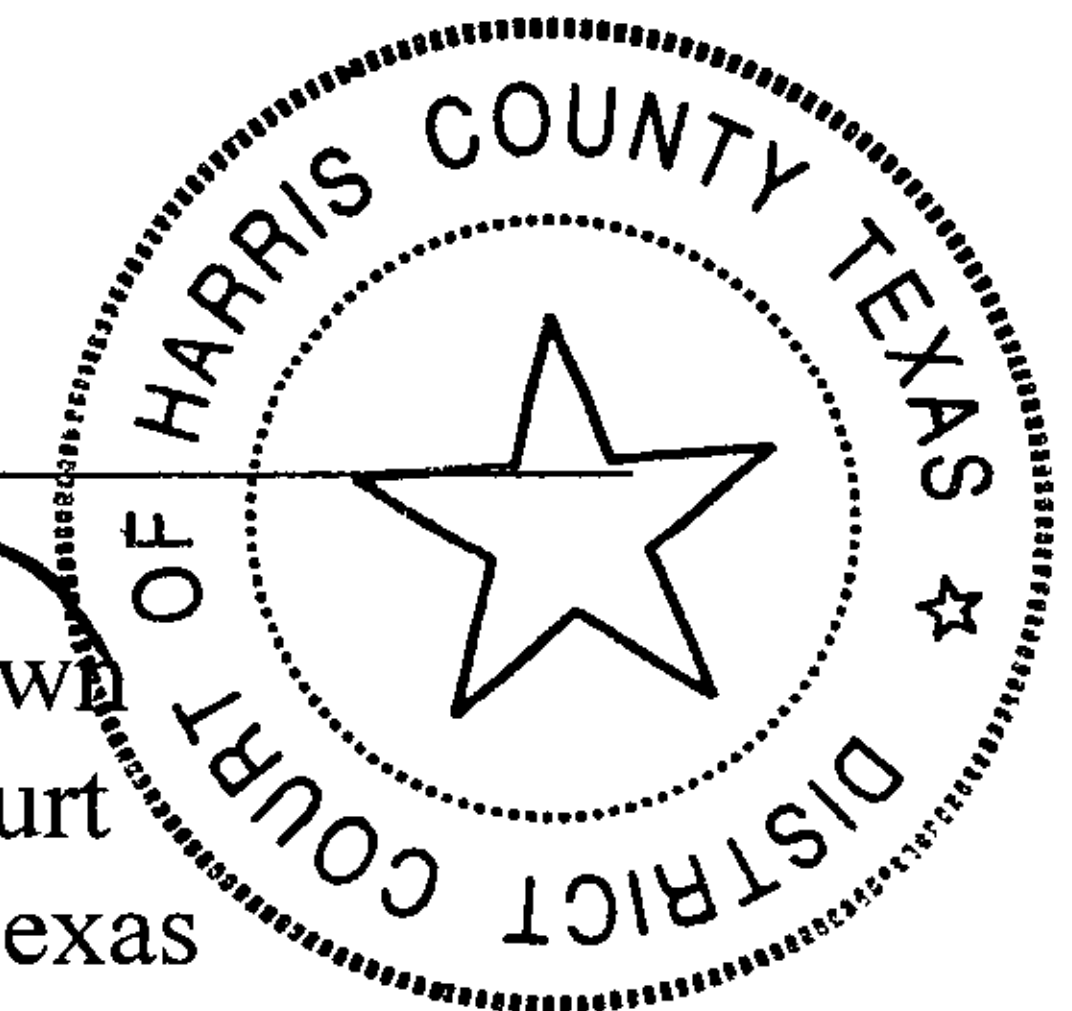
DENIES ✓

the State's motion.

SIGNED this date, the 18 day of October, 2011.

J. Brown

Judge Susan Brown  
185<sup>th</sup> District Court  
Harris County, Texas



*Appendix B*

*Affidavit of John Barnhill*

# **THE STATE OF TEXAS**

## **COUNTY OF HARRIS**

### **A F F I D A V I T**

BEFORE ME, the undersigned authority, personally appeared John Barnhill, who upon being duly sworn, deposed and stated as follows:

My name is John Barnhill. I am employed as an assistant district attorney in and for Harris County, Texas, and I am the General Counsel of the Harris County District Attorney's Office. The statements contained herein are true and correct and within my personal knowledge.

On October 18, 2011, Carl Hobbs, the Chief of the Grand Jury Division of the Harris County District's Office, Steve Morris, Bureau Chief of the Governmental Integrity Bureau of the Harris County District Attorney's Office, and I were present in the grand jury room for the Grand Jury of the 185th District Court of Harris County, Texas, while the grand jury was in session. It was apparent that the grand jurors were preparing to question a witness, Brent Mayr, who is also a criminal defense attorney. Mr. Hobbs, Mr. Morris, and I were then escorted out of the grand jury room by the grand jury bailiff against our will.

Just prior to being escorted out of the grand jury room by the bailiff, I observed the bailiff in her office and overheard the bailiff speaking in a telephone conversation. The bailiff said to the person on the phone, "They told me to arrest the DAs." From that, I assumed that the grand jury had instructed the bailiff to arrest Mr. Hobbs, Mr. Morris and me if we remained in the grand jury room while the grand jury was attempting to question the witness. The foreman of the grand jury also commented at one point that she would call the judge. She subsequently ordered us out of the room while they conducted their investigation. She explained after the call that she had been informed that she could conduct the investigation without an attorney representing the State being present.

We left the grand jury room and sought an appearance before the Honorable Susan Brown, the Judge of the Grand Jury for the 185th District Court of Harris County, Texas. Along with Jim Leitner, the

First Assistant of the Harris County District Attorney's Office; Alan Curry, the Chief of the Appellate Division of Harris County District Attorney's Office; and Eric Kugler, a Section Chief of the Appellate Division of the Harris County District Attorney's Office, I appeared before Judge Susan Brown to urge her to grant the State's motion for an assistant district attorney to be present during the questioning of witnesses and receiving of evidence by the Grand Jury of the 185<sup>th</sup> District Court. Prosecutors explained that no motion had been made to disqualify the Harris County District Attorney's Office or request for a special prosecutor which would indicate a potential conflict of interest to have an assistant district attorney present when questioning the witness. The State moved to be admitted into the grand jury room while the 185<sup>th</sup> Grand Jury questioned witnesses, in particular Mr. Brent Mayr. The State further informed Judge Susan Brown that the grand jury was presently questioning the witness in violation of Article 20.03 of the Texas Code of Criminal Procedure without a representative of the State in the room. Prosecutors explained that they understood the bailiff was instructed to arrest them if they entered the grand jury room while the 185<sup>th</sup> grand jurors questioned this particular witness.

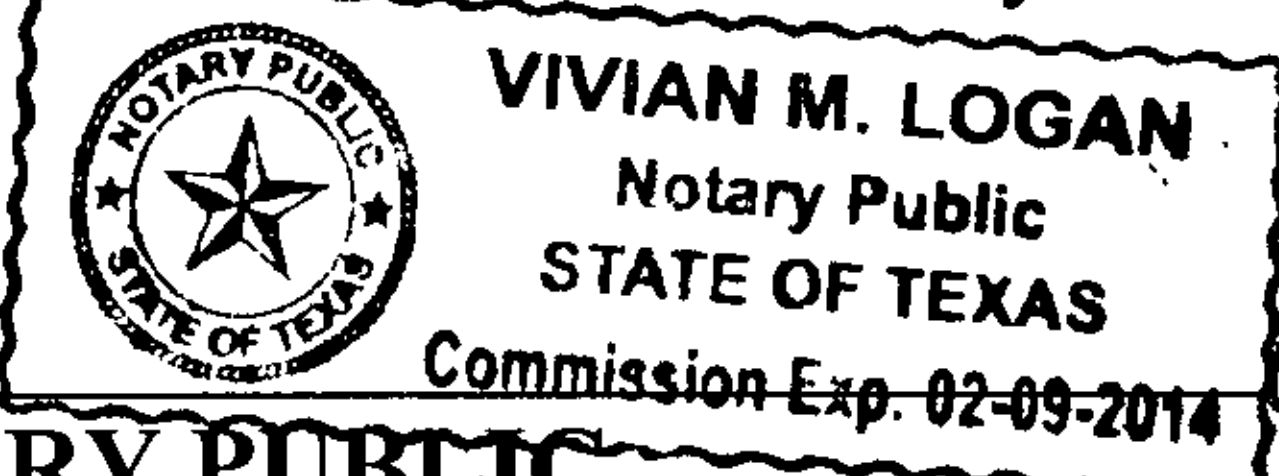
Judge Brown denied the motion to admit a representative of the State to the grand jury room while they questioned the witness. Her rationale for the ruling was not clear. She repeatedly asked the prosecutors why they wanted to be present for the questioning and asked if there were any cases on point. She discounted the language of *State ex rel. Holmes v. Salinas*, 784 S.W.2d 421, 426 (Tex. Crim. App. 1990), and stated that this was the grand jury's investigation, not the district attorney's investigation. She also repeatedly cited *In re Guerra*, 235 S.W.3d 392 (Tex. App.—Corpus Christi 2007, no pet.), and asked the prosecutors if they had read that case. She stated that the law was unsettled, that there were no cases on point, and she denied relief. She ordered that the State's *Motion For Access To The Grand Jury Room While Grand Jurors Are Not Deliberating* be filed without a cause number and under seal to preserve grand jury secrecy.

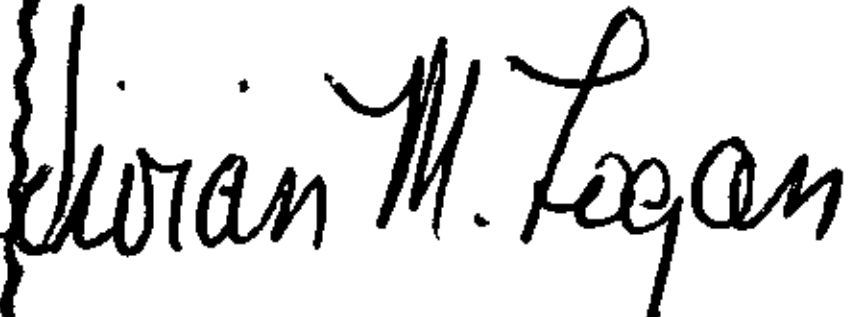
Additionally, I was informed by Mr. Leitner that he received a telephone call from Chip Lewis, the attorney for Amanda Culberson. Mr. Leitner told me that Mr. Lewis related to him that Ms. Culberson has been subpoenaed as a witness before the 185<sup>th</sup> Grand Jury for 9:00 a.m. on October 20, 2011. As evidenced by numerous stories in the

Houston Chronicle and elsewhere, Mr. Mayr and Ms. Culberson are two of the most prominent personalities surrounding the Houston Police Department's use of Intoxilyzer machines in their mobile Blood Alcohol Testing vans. Apparently, the Grand Jury intends to continue an independent investigation on a matter involving Ms. Culberson and Mr. Mayr, but without advice from a Harris County Assistant District Attorney. Therefore, a stay in the grand jury proceedings on this matter would assure that the Grand Jury does not continue to meet and interrogate witnesses without such protections required by the Code of Criminal Procedure.

  
**JOHN BARNHILL**

SWORN TO AND SUBSCRIBED before me on this the 19th day of October,  
2011.

  
**NOTARY PUBLIC**  
in and for Harris County, Texas



*Appendix C*

*Affidavit of Carl Hobbs*



**THE STATE OF TEXAS**

**COUNTY OF HARRIS**

**A F F I D A V I T**

BEFORE ME, the undersigned authority, personally appeared Carl W. Hobbs, who upon being duly sworn, deposed and stated as follows:

My name is Carl W. Hobbs. I am employed as an assistant district attorney in and for Harris County, Texas, and I am the Chief Prosecutor of the Grand Jury Division of the Harris County District Attorney's Office. The statements contained herein are true and correct and within my personal knowledge.

I was outside the 185<sup>th</sup> Grand Jury room on October 18, 2011, and noted that the grand jurors had concluded the indictments presented to them for the day, the clerk had come, and she had been presented the indictments by the 185<sup>th</sup> Grand Jury when defense attorney, Brent Mayr, appeared outside of the Grand Jury room and said he had been summoned by the 185<sup>th</sup> Grand Jury as a witness. I, along with John Barnhill, General Counsel for the Harris County District Attorney's Office, and Steve Morris the Chief of the Governmental Integrity Bureau of the Harris County District Attorney's Office, were present outside the grand jury room for the Grand Jury of the 185th District Court of Harris County, Texas.

The grand jury called Mr. Mayr into the 185<sup>th</sup> Grand Jury, and I accompanied him demanding the right to be present unless we were disqualified from the matter, which had not occurred. The foreman told me that they did not want me present when they questioned Mr. Mayr, but the foreman did not state that the Harris County District Attorney's Office was disqualified or that the grand jury was investigating anyone from the Harris County District Attorney's Office. I explained to the foreman that I have a duty by statute to investigate crimes that occur in Harris County and I am entitled to be present in the grand jury when witnesses are present and being questioned by the grand jury unless our office is disqualified. The foreman responded that the Grand Jury was conducting an independent investigation, and that they were advised that they could conduct the investigation without the presence of an assistant district attorney, and question the witness outside the presence of a prosecutor. I stated again that I needed to be present, and that our office believed the law entitled an assistant district attorney to be present during all questioning of a witness before a grand jury. I requested that they recess to allow our office to brief the matter and present it to Judge Susan Brown, Presiding Judge of the

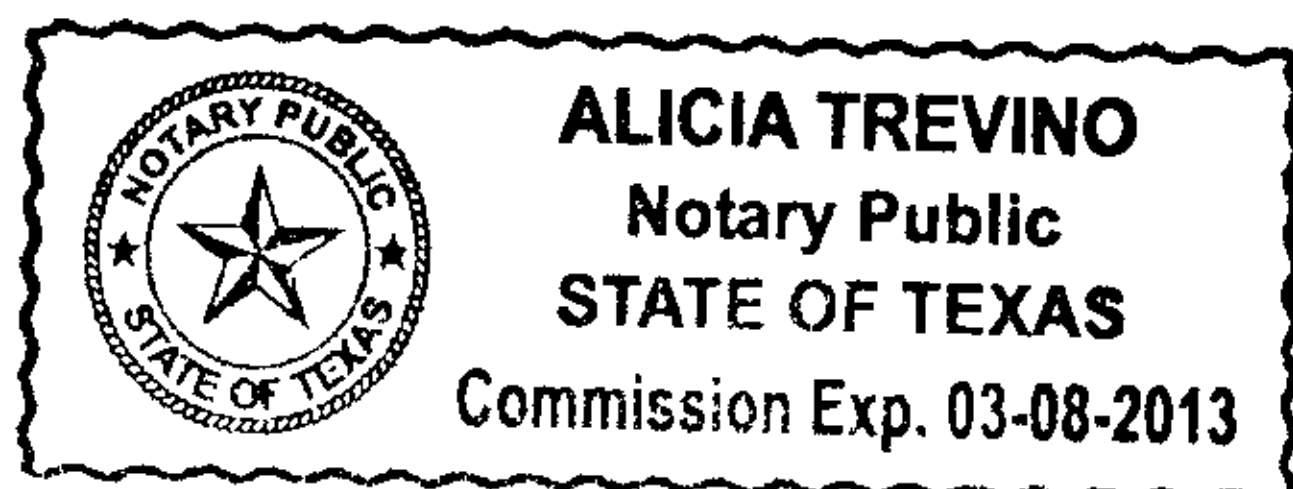
185<sup>th</sup> District Court, for her ruling. The foreman asked how long that would take, and Mr. John Barnhill stated that our office would have it briefed by the following day. The foreman responded by telling Mr. Barnhill, Mr. Morris, and I to leave the room. The grand jurors spoke behind closed doors briefly, and then called us back into the room. The foreman stated she would offer a compromise, that they be allowed with the court reporter and the witness without a representative of the district attorney's office to propound questions on the witness, and the Harris County District Attorney's office could take the matter up with Judge Brown the following day, on October 19, 2011. I stated that we would not accept that compromise and again demanded to be present when they questioned the witness pursuant to Texas statutory law.

At one point as we were coming and going from the grand jury room during these discussions, the foreman stated that she had to make a telephone call, and I asked if she needed privacy. I saw her leave the room, enter an adjoining room, I watched her take an open cellular telephone with her, and she shut the door. She then returned and stated that she was told that she did not have to permit an attorney representing the State to be present when they conducted their investigation.

The foreman again sent us outside the room, and the court reporter and Mr. Mayr entered the grand jury room. I walked into the room, as well, with Mr. Barnhill and Mr. Morris following when the grand jury bailiff ordered me to accompany her out of the room, which I did. The door was closed on the grand jury room with the witness and court reporter inside, but no attorney for the State, no attorney pro tem, and no special prosecutor present to advise the grand jury. The witness and members of the grand jury left more than an hour later.

Carl W. Hobbs  
CARL W. HOBBS

SWORN TO AND SUBSCRIBED before me on this the 19th day of October, 2011.



Alicia Trevino  
NOTARY PUBLIC  
in and for Harris County, Texas